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No. 99-1533

IN THE

Supreme Court of the United States

M.C. PRODUCTS, INC., A CALIFORNIA CORPORATION; AUDIO ENTERTAINMENT NETWORK INC., A NEVADA CORPORATION; DAVID L. KAHN,
Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, NOW AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AT&T CORP. IN OPPOSITION

LAURA A. KASTER
JENNIFER L. LEUBA
AT&T LITIGATION
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4838

STEVEN M. BIERMAN*
ALAN M. UNGER
JOHN J. KUSTER
SIDLEY & AUSTIN
875 Third Avenue
New York, NY 10022
(212) 906-2000

Counsel for Respondent

*Counsel of Record

April 17, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTION PRESENTED

Whether the Ninth Circuit erred in affirming the district court's dismissals, under the doctrine of federal comity, of two actions duplicative of litigation on appeal from another district court, after petitioners failed to comply with an order directing them to re-file their actions in the latter district court within 30 days?

STATEMENT REQUIRED BY RULE 29.6

AT&T Corp. ("AT&T") has no parent company. No publicly held company owns 10 percent or more of AT&T's stock.

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STATEMENT OF THE CASE

In accordance with well-established principles of federal comity, the United States District Court for the Central District of California upon its own initiative dismissed these actions (the "California actions") without prejudice in 1998 to enable petitioners M.C. Products, Inc. ("MCP"), Audio Entertainment Network, Inc. and David Kahn to re-file their claims within 30 days in the United States District Court for the District of Nevada as a related matter to the case of *MRO Communications,*

Inc. v. AT&T Corp. (the "Nevada action"). (Pet. App. at 15a-19a.)[1] When petitioners opted to pursue appeals rather than re-file their claims in Nevada in compliance with the district court's orders (Pet. at 2), the California actions were dismissed with prejudice, as specified by the orders. (*Id.*)

The Ninth Circuit correctly held (and petitioners themselves do not now contend otherwise, *see id.* at 1-5) that the Nevada action involved parties, claims, and relief virtually identical to those involved in the California actions. (Pet. App. at 4a-8a, 13a-14a.) For this reason, and because counsel for petitioners repeatedly had represented to the district court that the issues in the California actions ultimately would be resolved by the Nevada action that then was on appeal to the Ninth Circuit (*see id.* at 4a-5a & n.3), the Ninth Circuit properly affirmed the district court's valid exercise of discretion over the duplicative California actions in directing petitioners to re-file their claims against AT&T in Nevada before the same judge who presided over the Nevada action. (*Id.* at 1a-14a.)[2]

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[1] In an unpublished decision dated December 13, 1999, the Ninth Circuit affirmed in all respects the district court's dismissal of MRO's claims against AT&T. On March 6, 2000, MRO petitioned this Court for a writ of certiorari.

[2] In rendering its decision on federal comity grounds, the Ninth Circuit cited to the following admission by petitioners' counsel to the district court:

> THE COURT: What you're telling me is all the issues that are here in th[ese] lawsuit[s] are before the Las Vegas court, and have been decided by Judge Pro [of the United States District Court for the District of Nevada], or are on appeal from Judge Pro. And whatever the result of that appeal will be, it will go back to Judge Pro, if they reverse, and will be taken up by Judge Pro in Las Vegas. So why are we wasting our time?
>
> MR. ARCHER (counsel for MCP): Well, that's why we've agreed that these cases here can be stayed pending –
>
> THE COURT: No, we're not talking about stays. That's a waste of time. If Judge Pro will decide all the issues, why should we stay it?

(Pet. at 5a n.3.)

The Ninth Circuit's unpublished affirmances of the district court's dismissals of the California actions on federal comity grounds involve no issues of national concern. In addition and contrary to petitioners' contentions (Pet. at i, 2, 4), these decisions do not conflict in any way with this Court's opinion in *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 72 S.Ct. 219 (1952). The petition seeks leave to appeal only the common sense application of well-established principles of federal comity to the unique facts of these cases. Therefore, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE PETITION

Petitioners' two arguments for grant of a writ of certiorari are baseless.

1. Petitioners assert on the basis of the Ninth Circuit's unreported decisions transferring the California actions that California courts will "clear dockets," and therefore, the decisions should be addressed. (Pet. at 3.) This concern is unfounded. Under the Ninth Circuit's Local Rule 36-3, orders like the ones at issue, not designated for publication, "shall not be regarded as precedent and shall not be cited to or by [the Ninth Circuit] or any district court of the Ninth Circuit . . . except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Ninth Circuit Local Rule 36-3. Therefore, the decisions below are without precedential value and will have no potential impact on other courts that could justify review.

Moreover, the facts involved here are unlikely to be repeated. Here, two companies owned and operated by David Kahn, as well as Kahn himself, not only filed two separate actions in California admittedly involving the same claims, parties and requested relief as those in the Nevada action, but conceded to the courts below that the resolution of the Nevada action on appeal would control the determination of the California ac-

tions. (Pet. App. at 4a-8a, 13a-14a.) These *sui generis* facts are no basis for a general reduction of the California docket.

2. Petitioners contend that the Ninth Circuit erroneously departed from the doctrine of federal comity set forth in this Court's opinions in *Kerotest* and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 96 S.Ct. 1236 (1976). (Pet. at 2-4.) According to petitioners, because *Kerotest* affirmed a stay (not a dismissal) of duplicative litigation, and because the decision in *Colorado River* was predicated on comity concerns related to a federal statute (the McCarran Amendment) not implicated by the present cases, the Ninth Circuit's unpublished decisions affirming the dismissals with prejudice after petitioners failed to re-file their claims in Nevada are "contrary" to *Kerotest* (and implicitly, *Colorado River*, which expressly relied on *Kerotest*). (Pet. at 2-4.)

However, as the Ninth Circuit here properly acknowledged, *Kerotest* and *Colorado River* stand for a broader principle: they vest federal courts with the authority to avoid duplicating litigation proceeding in other federal courts. (Pet App. at 3a-4a (citing *Kerotest*, 340 U.S. at 183-84); Pet. App. at 13a-14a (citing *Colorado River*, 424 U.S. at 817).) Indeed, *Kerotest* observed that because the problem of duplicative litigation cannot be addressed by "rigid mechanical solution[s]," federal courts "[n]ecessarily" are vested with "an ample degree of discretion" in addressing such situations. *Kerotest*, 342 U.S. at 183-84, 72 S.Ct. at 221; *see id.* ("wise judicial administration" encompasses a wide range of solutions geared at conserving judicial resources and comprehensively disposing of litigation to avoid inconsistent judgments). Thus, wholly consonant with *Kerotest*, the Ninth Circuit properly affirmed the reasonable solution devised by the district court to avoid duplication by the California actions – a solution that petitioners opted to disregard. (Pet. App. at 8a); *see also Serlin v. Arthur Andersen & Co.*, 3 F.3d 221, 223-24 (7th Cir. 1993) (affirming dismissal of

duplicative litigation pending in another federal court on comity grounds); *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985) (same); *Church of Scientology of California v. United States Dep't of Army*, 611 F.2d 738, 749-50 (9th Cir. 1979) (same).

The petitioners also are mistaken in asserting that the Ninth Circuit's unpublished decisions are "contrary" to 28 U.S.C. § 1404(a), the federal statute that governs changes of venue. (Pet. at 4; *see also id.* at 3.) Section 1404(a) authorizes a district court, "[f]or the convenience of parties and witnesses" to transfer, "in the interest[s] of justice," a "civil action to any other district or division where it might have been brought." *Id.* But the decisions below were not animated by convenience; they addressed the need to conserve judicial resources and avoid duplicative litigation and inconsistent judgments. Neither *Kerotest* nor *Colorado River*, which also focused on judicial considerations, cited to §1404(a). Therefore, petitioners' assertion that the Ninth Circuit failed to "follow[]" § 1404(a) (Pet. at 4), is utterly irrelevant. The unpublished decisions at issue involved the application of settled principles to unique facts and do not merit review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

LAURA A. KASTER
JENNIFER L. LEUBA
AT&T LITIGATION
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4838

STEVEN M. BIERMAN*
ALAN M. UNGER
JOHN J. KUSTER
SIDLEY & AUSTIN
875 Third Avenue
New York, NY 10022
(212) 906-2000

Counsel for Respondent

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